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# Kentucky Law Survey: Domestic Relations

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# Domestic Relations

BY LOUISE GRAHAM\*

## INTRODUCTION

In the decade since Kentucky's adoption of the Uniform Marriage and Divorce Act,<sup>1</sup> the state's courts have faced the task of interpreting it in domestic relations litigation. This past year was no exception. A number of problems before Kentucky courts were recurrent issues. For example, the divisibility of educational degrees acquired by one spouse again required court assessment.<sup>2</sup> Similarly, issues surrounding both maintenance and child support reappeared.<sup>3</sup> These recurrent issues, along with new issues requiring court solution, heavily burdened trial and appellate courts. This Survey will discuss court resolutions of significant problems in the areas of marital property, maintenance and child support, enforcement of judgments, child custody, paternity and marriage regulation.

## I. MARITAL PROPERTY

### A. *Antenuptial agreements*

For more than fifty years Kentucky courts have distinguished between antenuptial agreements providing for the waiver of the rights of a surviving spouse and those that provide for support or

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<sup>1</sup> The Kentucky General Assembly adopted substantial portions of the Uniform Marriage and Divorce Act in 1972. See KY. REV. STAT. §§ 403.010-.350 (Bobbs-Merrill Cum. Supp. 1982) [hereinafter cited as KRS]. In 1980, the state legislature adopted the Uniform Child Custody Jurisdiction Act. See KRS §§ 403.400-.630 (Cum. Supp. 1982). Although Kentucky statutes on custody jurisdiction substantially resembled the Act prior to its adoption, some significant provisions were deleted. See *Turley v. Griffin*, 508 S.W.2d 764 (Ky. 1974) (home state not clearly defined by Act).

<sup>2</sup> For discussions of earlier litigation of this issue see Crone, *Domestic Relations*, 69 KY. L.J. 581 (1980-81); Graham & Jakubowicz, *Domestic Relations*, 70 KY. L.J. 425 (1981-82); Harris & Donoho, *Domestic relations*, 68 KY. L.J. 753 (1979-80).

<sup>3</sup> For discussions of these issues, see the Surveys cited in note 2 *supra*.

property division upon divorce.<sup>4</sup> Although the former have been consistently upheld absent proof of fraud or of other unfairness,<sup>5</sup> the latter have been branded as void contracts prohibited by state public policy.<sup>6</sup> In *Jackson v. Jackson*,<sup>7</sup> the Kentucky Supreme Court continued this distinction, permitting enforcement in a divorce context of an antenuptial agreement for the lifetime support of the wife because it found that the agreement was made without reference to the event of divorce.

Juanita and Carl Jackson had a rather typical second marriage.<sup>8</sup> Both parties were employed at the time of their marriage. Juanita owned a substantial farm; Carl owned real estate. During the marriage, Carl sold both farm equipment and cattle. In both instances he received proceeds of the sales for his personal disposition. When Carl's real estate was sold, however, Juanita did not receive proceeds. Seven years into the marriage Carl left Kentucky with a new pickup (purchased by the parties but registered in his name) and \$30,000.<sup>9</sup> On divorce the trial court gave effect to the parties' antenuptial agreement and found that \$300 per month was "decent support."<sup>10</sup> The court of appeals overruled the trial court's decision, concluding that the agreement was invalid because it encouraged divorce or separation.<sup>11</sup> The Supreme Court disagreed because it viewed the agreement as an

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<sup>4</sup> *Stratton v. Wilson*, 185 S.W. 522 (Ky. 1916). Recently, the Kentucky Supreme Court referred to the rule as hornbook law. *Jackson v. Jackson*, 626 S.W.2d 630, 631 (Ky. 1981).

<sup>5</sup> See, e.g., *Lipski v. Lipski*, 510 S.W.2d 6 (Ky. 1974); *Harlin v. Harlin*, 87 S.W.2d (Ky. 1935); *Fish v. Fish*, 212 S.W. 586 (Ky. 1919); *Stephens v. Stephens*, 205 S.W. 573 (Ky. 1918); *Settles v. Settles*, 114 S.W. 303 (Ky. 1908); *Forwood v. Forwood*, 5 S.W. 361 (Ky. 1887).

<sup>6</sup> *Stratton v. Wilson*, 185 S.W. at 522.

<sup>7</sup> 626 S.W.2d at 630.

<sup>8</sup> In a number of cases upholding a spouse's waiver of statutory rights when a marriage is terminated by death, Kentucky courts have considered the fact that the marriage was a second one, a strong reason to uphold the waiver. See *Harlin v. Harlin*, 87 S.W.2d at 939; *Fish v. Fish*, 212 S.W. at 587; *Stephens v. Stephens*, 205 S.W. at 574. Dissolution of a second marriage where both parties bring substantial assets to the marriage is likely to be difficult, whether the marriage is dissolved by death or divorce. This is particularly true in light of the Kentucky rule that requires a party seeking the return of non-marital property brought into the marriage to trace that property into specific assets. See *Brunson v. Brunson*, 569 S.W.2d 173, 176 (Ky. Ct. App. 1978).

<sup>9</sup> 626 S.W.2d at 630.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

"arm's length" transaction that did not mention and was not dependent upon subsequent dissolution.<sup>12</sup> Thus, the agreement stood because it did not mention divorce or separation.

Although the *Jackson* resolution seems fair,<sup>13</sup> the Court's reliance upon the agreement's failure to mention divorce or separation is a technical one that does little to illuminate the policy concerns that prohibit recognition of such agreements.<sup>14</sup> More importantly, the decision fails to address the issue of whether policies relevant in 1916, when Kentucky courts first distinguished between enforceable and non-enforceable antenuptial agreements, have continued vitality, particularly in light of the changes in Kentucky divorce law since that time.

The *Jackson* Court relied upon *Stratton v. Wilson*,<sup>15</sup> the 1916 case validating an antenuptial agreement to waive dower rights upon the death of the husband in spite of a separation provision in the agreement for a limited settlement should the marriage be dissolved by divorce. The *Stratton* distinction, permitting antenuptial agreements that provide for the waiver of statutory shares in the event that the marriage is dissolved by death and in-

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<sup>12</sup> *Id.* at 632.

<sup>13</sup> The facts of the *Jackson* case show that Carl Jackson had dissipated a substantial portion of Juanita's separate assets. *Id.* at 630. When one party dissipates marital property Kentucky appellate courts have permitted trial courts to treat the dissipated property as though it existed, to compute the divisible property including the lost assets, and to award the dissipating spouse the previously expended assets. See *Barriger v. Barriger*, 514 S.W.2d 114, 115 (Ky. 1974). See also *Faulkner v. Faulkner*, 582 S.W.2d 292 (Mo. Ct. App. 1979); *Reaney v. Reaney*, 505 S.W.2d 338 (Tex. Civ. App. 1974).

<sup>14</sup> See text accompanying notes 15-18 *infra* for a discussion of the policies behind the rule. The Uniform Marriage and Divorce Act makes no specific provision for antenuptial agreements other than the provision that separate property may include property subject to a valid agreement of the parties. UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. 144 (1971) (commissioner's comments). Some states that have adopted the Act recognize such agreements if the agreement is valid in the state in which it is made but do not permit such agreements to bar trial court discretion in dividing marital property. Compare *In re Marriage of Franks*, 542 P.2d 845 (Colo. 1975) with *In re Marriage of Thompson*, 568 P.2d 98 (Colo. Ct. App. 1977). Some community property states permit antenuptial agreements to abrogate community property rights during marriage. See *Spector v. Spector*, 531 P.2d 176 (Ariz. Ct. App. 1975); *In re Marriage of Dawley*, 551 P.2d 323 (Cal. 1976); *Sarpy v. Sarpy*, 323 So. 2d 851 (La. Ct. App. 1975). Wisconsin permits antenuptial agreements by statute. See WIS. REV. STAT. ANN. § 247.555(11) (1981).

<sup>15</sup> 185 S.W. at 522. In *Sousley v. Sousley*, 614 S.W.2d 942 (Ky. 1981), the Court declined to consider reversal of the *Stratton* rule because the issue was not clearly presented to it.

validating those agreements that take effect should the marriage be dissolved by divorce, is grounded in the traditional view that the latter class of agreements either inherently de-stabilize marriage by permitting persons who are entering into a marriage to contemplate divorce or promote divorce by making it advantageous to one of the parties to procure a divorce.<sup>16</sup> At the time *Stratton* was decided, Kentucky's divorce scheme generally required that the party seeking a divorce demonstrate that he or she was entitled to a divorce based upon the "fault" of the other party to the marriage.<sup>17</sup> Further, the issue of fault had some bearing upon a party's entitlement to alimony.<sup>18</sup> Court reluctance to uphold agreements that barred a fault-free party from support or granted it to a party substantially at fault is understandable in light of such a marriage dissolution system. Whether the public policy underlying that fault-based system remains viable today raises other questions.

In 1972 Kentucky enacted portions of the Uniform Marriage and Divorce Act.<sup>19</sup> Under the marriage dissolution system envisioned by that Act, the issue of fault has largely been eliminated.<sup>20</sup> Divorce is granted solely upon the ground of irretriev-

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<sup>16</sup> 185 S.W. at 522. See generally R. PETRILLI, KENTUCKY FAMILY LAW § 13.8 (1969).

<sup>17</sup> At the time *Stratton* was decided, only two of the statutory grounds for divorce were not related to fault. 1915 Ky. Stat. § 2117 (Baldwin) (impotency or malformation preventing sexual intercourse or lack of cohabitation for five years). Accord *Clark v. Clark*, 53 S.W. 644 (Ky. Ct. App. 1899). Other grounds for divorce—such as abandonment for more than one year, living in adultery, condemnation for a felony, the concealment or contraction of a loathsome disease, force, fraud or duress, or joining certain religious societies requiring a renunciation of the marriage covenant—were all statutorily fault-based since they granted a divorce to the party not at fault. 1915 Ky. Stat. § 2117 (Baldwin). Additionally, habitual drunkenness was a statutory ground for divorce if the complaining spouse was not "in like fault." *Id.* A husband could be granted a divorce when the wife was pregnant by another man without the husband's knowledge at the time of the marriage or where the wife was either lewd or lascivious without the necessity of proof that he was not in like fault. *Id.*

<sup>18</sup> The statute allowed alimony to a wife if she did not have sufficient estate of her own. 1893 Ky. Stat. § 2122. Kentucky courts interpreted the statute to provide alimony to the wife in some cases in which the divorce was awarded to the husband, implying fault on the wife's part, as long as the husband was also at fault and the wife was not guilty of moral delinquency. *Green v. Green*, 153 S.W. 775 (Ky. 1913). See also *Pore v. Pore*, 50 S.W. 681 (Ky. 1899); *Lacey v. Lacey*, 23 S.W. 673 (Ky. 1893).

<sup>19</sup> See note 1 *supra* for a reference to the statute.

<sup>20</sup> UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 91-94 (1971) (commissioner's pref-

able breakdown.<sup>21</sup> Both property division and a spouse's initial entitlement to maintenance must be determined without reference to the fault of either party.<sup>22</sup> Spouses are entitled to make either separation agreements or divorce agreements settling issues of property division and adult support.<sup>23</sup> The court reviews such agreements under an "unconscionability" standard,<sup>24</sup> leaving the parties wide latitude to settle their own affairs. Further, the property division portion of the statute refers specifically to the possibility of such agreements.<sup>25</sup> In addition, the current divorce statute accepts both the autonomy of the spouses in arranging their own affairs and the view that amicable settlement of marital disputes is preferable to protracted and harmful litigation.<sup>26</sup>

Although acceptance of antenuptial agreements would not necessarily pose to the current system the same problem of disruption which was posed to a fault-based system, two other problems with regard to such agreements remain. The first is the traditional view that antenuptial agreements promote divorce.<sup>27</sup> Adopting an irretrievable breakdown standard for marriage dissolution does not mean that a state loses all interest in discouraging divorce. Even with an essentially "no fault" system, Kentucky retains a stated interest in strengthening and preserving the

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atory note).

<sup>21</sup> KRS §§ 403.150, .170 (Cum. Supp. 1982).

<sup>22</sup> The trial court is directed to divide the marital property without regard to marital misconduct. KRS § 403.190(1) (Cum. Supp. 1982). Although fault is not a consideration in whether maintenance is to be awarded initially, it may influence the amount of maintenance. *Chapman v. Chapman*, 498 S.W.2d 134 (Ky. 1973). Similarly, child custody determinations are to be made without regard to parental misconduct that does not affect the parent-child relationship. KRS § 403.270(2).

<sup>23</sup> KRS § 403.180(1) (Cum. Supp. 1982).

<sup>24</sup> Unconscionability has been interpreted to require more than proof of a "bad bargain." *Peterson v. Peterson*, 583 S.W.2d 707 (Ky. Ct. App. 1979) (husband's agreement to pay \$700 out of his \$934 monthly net income does not render agreement unconscionable even though such an award would have amounted to an abuse of trial court discretion).

<sup>25</sup> See KRS § 403.190(2)(d) (Cum. Supp. 1982).

<sup>26</sup> See KRS § 403.110(2), (3) (Cum. Supp. 1982).

<sup>27</sup> *Stratton v. Wilson*, 185 S.W. at 522. See generally R. PETRILLI, *supra* note 16, at § 13.8.

marital institution.<sup>28</sup> As a factual matter it is not clear that antenuptial agreements actually promote divorce; despite Kentucky's prohibition against such agreements, the number of marriages dissolved by divorce has risen steadily.<sup>29</sup> Rather than continuing an empirically unjustified blanket prohibition against such agreements, the *Jackson* court might have reexamined the policy behind refusing to enforce such agreements. In both *Stratton* and the cases discussing waiver of spousal rights when the marriage is dissolved by death, the underlying theme is one of concern with the fairness of the agreement.<sup>30</sup> The state's interest in stable marriage relationships and in promoting amicable and fair settlements when those relationships are dissolved dictates that the state be able to strike down agreements that unfairly advantage or disadvantage one of the parties should the marriage be dissolved by divorce. The *Stratton* rule, however, is not necessary to effect such a policy. That rule strikes down all antenuptial agreements relating to divorce or separation without regard to the relative fairness of such agreements.

The second problem, then, is how to set standards for determining when an agreement should be unenforceable because it unfairly disadvantages one of the parties to the marriage. Both the divorce statute and case law concerning agreements to waive dower rights support a rule requiring that the agreement meet a two-point test.<sup>31</sup> First, the agreement should be fair at the time it

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<sup>28</sup> The state's continued interest in strengthening the marriage institution despite its adoption of the Uniform Marriage and Divorce Act is demonstrated by the fact that the court must make an independent determination of irretrievable breakdown. See KRS § 403.170 (Cum. Supp. 1982); *Laffosse v. Laffosse*, 564 S.W.2d 220 (Ky. Ct. App. 1978). Additional concern for the marriage is demonstrated by provisions for conciliation conferences although such conferences are not mandatory. See *Putnam v. Fanning*, 495 S.W.2d 175 (Ky. 1973); KRS § 403.170.

<sup>29</sup> In fact, the rate of divorces and annulments in Kentucky has increased almost 50% since 1965. The rate of divorce per 1,000 people in Kentucky was 2.6 in 1965, but had risen to 4.5 per 1,000 people by 1979. See U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 82 (102d ed. 1981).

<sup>30</sup> See 185 S.W. at 522.

<sup>31</sup> The divorce statute supports the two-point test for two reasons. First, since the statute requires the court to interpret the Act in light of the reality of marital experience it

is made. Both parties should be fully informed of the assets held by each and the rights normally accruing from the marital relationship.<sup>32</sup> The parties should be capable of using that information to make a reasonably intelligent decision as to whether the agreement is in their interest.<sup>33</sup> Neither party should be allowed to overreach the other. Second, the court should not enforce such an agreement if, at the time enforcement is sought, it is unfair to one of the parties in view of circumstances that were unknown and unanticipated at the time the agreement was made and that are so substantial and continuing as to render the agreement unconscionable.<sup>34</sup>

Adoption of the proposed standards for antenuptial agreements would advance the state's policy of strengthening marriages by promoting pre-nuptial discussion of economic prob-

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is unlikely that it precludes some consideration of divorce even at the inception of a marriage. See KRS § 403.110(5) (Cum. Supp. 1982). If agreements regarding divorce can be made, they should not be subject to a higher standard than the unconscionability standard for separation and property settlement agreements. See KRS § 403.180. Case law regarding agreements to waive statutory rights on the death of one spouse traditionally used the suggested test. See note 5 *supra* for a list of the cases.

<sup>32</sup> Compare *Lipska v. Lipska*, 510 S.W.2d at 6 (agreement upheld) with *Simpson v. Simpson's Ex'rs*, 23 S.W. 361 (Ky. 1893) (husband a shrewd businessman whose estate consisted of intangibles; wife was not informed of extent of estate; agreement subsequently set aside).

<sup>33</sup> Occasionally, spouses have claimed they could not make an intelligent decision because they were separated from persons who might have given them advice. *Forwood v. Forwood*, 5 S.W. at 362. Where there is no disparity in the parties' intelligence and one spouse did not actually prevent the other from obtaining advice, courts have generally upheld the agreements. *Id.* at 364.

<sup>34</sup> Neither spouse should be charged with unpredictable events. For example, a spouse who has contracted a debilitating illness should not be bound by an agreement not to seek support. Under the proposed rule, indiscriminate use of antenuptial agreements should not result in substantial disregard of the maintenance statute, KRS § 403.200 (Cum. Supp. 1982). Neither the property division provision, KRS § 403.190 (Cum. Supp. 1982), nor the maintenance statute, KRS § 403.200 (Cum. Supp. 1982), preclude the recognition of antenuptial agreements. The maintenance statute assumes that maintenance will not be awarded in every case. The proposed requirement would prevent an antenuptial agreement from operating as a bar to the use of maintenance in those cases in which the court deemed maintenance appropriate despite an agreement to the contrary. See *Ferry v. Ferry*, 586 S.W.2d 782 (Mo. Ct. App. 1979) (antenuptial agreement signed under mistaken assumptions cannot bar maintenance claim). The standard should be familiar to trial courts since it is the standard for modification of maintenance. See KRS § 403.250.



lems, since such problems are a primary factor in many divorces. This could be particularly important for second marriages where both parties bring significant assets to the marriage. The standards would not promote divorce since neither party could use an agreement that is unfair either at the time of making or at the time of enforcement to his or her advantage. Finally, the standards would be familiar to trial courts since they combine the standards used when agreements are enforced at the death of one of the spouses and with those used when modification of maintenance is sought. It is unfortunate that the Supreme Court in *Jackson* chose not to reexamine the policies underlying *Stratton*. Had the Court done so, it might have proposed a rule that would have been more consistent with present public policy as expressed by current legislation rather than continuing to give life to an obsolete public policy.

#### B. *Educational Degrees and Professional Licenses*

The second major type of marital property dispute faced by the appellate courts in the past year was the continuing problem of compensating one spouse for his or her contribution to the educational advancement of the other spouse.<sup>35</sup> In 1979 the court of appeals ruled in *Inman v. Inman* (*Inman I*) that a spouse not otherwise entitled to maintenance might recover the amount spent for direct support and school expenses during the period of education, plus reasonable interest and adjustment for inflation.<sup>36</sup> Recent appellate court decisions address this problem but the outcome of the cases is unclear.

In a second appeal from the trial court's further holdings in

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<sup>35</sup> For prior discussions of cases on this issue, see Graham & Jakubowicz and Harris & Donoho, *supra* note 2.

<sup>36</sup> 578 S.W.2d 266, 269 (Ky. Ct. App. 1979) (*Inman I*). Since the *Inman I* decision, courts of other states have considered similar problems dealing with compensation for spousal contribution to an educational degree or license. Although some courts have followed *Inman I*'s suggestion that compensation be valued according to the cost of the education (*In re Sullivan*, 8 FAM. L. REP. (BNA) 2165 (1982) (dicta); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 759 (Minn. 1981)), others have adopted different methods of valuation. See *Lesman v. Lesman*, 442 N.Y.S.2d 955 (Sup. Ct. 1981) (New York medical license not divisible, but wife's contribution to education may be considered in awarding alimony and equitable share of marital estate); *In re Marriage of Lundberg*, 318 N.W.2d 918 (Wis. 1982) (wife who put husband through medical school may be compensated by lump sum maintenance award payable in installments).

*Inman*, the court of appeals held in *Inman II* <sup>37</sup> that the spousal contribution compensable under *Inman I* may not be measured by the increased earning capacity of the degree holder and is restricted to direct contributions made by the non-degree holding spouse for support and school expenses.<sup>38</sup> In *Moss v. Moss* <sup>39</sup> the court of appeals directed that the non-degree holding spouse be compensated for contributing to the acquisition of a pharmacy degree, even though the non-degree holding spouse also was entitled to compensation under *Inman I* while in *Inman II* it limited the basis for compensation.

On the appeal of *Inman II*, the Kentucky Supreme Court ruled that the court of appeals' first decision, holding the license to practice dentistry marital property, was the law of the case and could not be redetermined upon a second appeal.<sup>40</sup> The formula posited by the Court to be used in placing a value on an educational degree implies that the court of appeals' first decision properly allowed the *Inman* trial court to consider John Inman's future earning capacity.<sup>41</sup> However, in an effort to provide guidance to both trial and appellate courts, the Supreme Court spoke to the issue of the educational degree as marital property. The Court first noted that in its view the degree was not marital property.<sup>42</sup> Nevertheless, the Court went on to state that were the issue before it, it would adopt a formula measured by the non-degree holder spouse's contributions toward living expenses, educational costs and *the potential for increase in future earning capacity made possible by the degree*.<sup>43</sup>

Because the real stake in litigation similar to *Inman* has been the ability to reach future earnings, the Court's statement is likely to raise more questions than it solves. To say that the degree is not property is simply a matter of semantics. The non-degree

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<sup>37</sup> *Inman v. Inman*, (*Inman II*) No. 81-CA-936-MR, 29 Ky. L. SUMM. 4, at 3 [hereinafter cited as KLS] (Ky. Ct. App. 1982), *reversed on other grounds*, No. 82-SC-266-DG, 29 KLS 14, at 12 (Ky. Nov. 23, 1982).

<sup>38</sup> 29 KLS 4, at 4.

<sup>39</sup> 639 S.W.2d 370 (Ky. Ct. App. 1982), Mrs. Moss received a maintenance award of \$150 per month for 18 months.

<sup>40</sup> 29 KLS 14, at 12.

<sup>41</sup> *Id.* at 13.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (emphasis added).

holder's ability to reach potential future earnings will make the name placed upon the award irrelevant. The outcome is particularly unfortunate because the Supreme Court's opinion simply restates the case law from other states. The Court's failure to examine the Kentucky statute closely and to explain its reasoning leaves litigants with an unclear rule unsupported by explanation.

In *Moss v. Moss* the court of appeals both restricted and expanded the *Inman I* doctrine. The *Moss* court went to some trouble to distinguish the divisible pharmacy degree, the non-divisible license to practice pharmacy and the non-divisible practice of the pharmacist.<sup>44</sup> Although the court found that the degree required compensation under the principles of *Inman I*, it ruled that neither the license nor the practice gave rise to an added award. The court regarded both the license and the practice as representations of a mere potential to earn.<sup>45</sup> It stated that the practice was "no more than a futuristic hope" and expressed concern that its inclusion in any scheme of property division would force division of an asset that might never materialize.<sup>46</sup>

The *Moss* court seems to have interpreted *Inman I* so as to preclude the valuation of a spouse's contribution to educational advancement by increased earning capacity.<sup>47</sup> A number of cogent arguments exist for refusing to so value the spouse's contribution. First, the property division statute could be interpreted to exclude division of future earning capacity because it requires division of property acquired during the marriage.<sup>48</sup> In the context of real estate owned by one party before the marriage but subject to a mortgage paid on after the marriage, Kentucky courts have had to consider the time at which acquisition of property has occurred.<sup>49</sup> Courts have held that such property was non-marital by virtue of acquisition before the marriage only to

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<sup>44</sup> 639 S.W.2d at 374.

<sup>45</sup> *Id.* The court in *Moss* also noted that academic scholarships were non-marital property. Loans to finance education were to be regarded as marital property contributions to the extent that marital funds were used to repay them. *Id.* at 375.

<sup>46</sup> *Id.* at 374.

<sup>47</sup> *But see* *Levy v. Levy*, 397 A.2d 374 (N.J. Super. Ct. Ch. Div. 1978).

<sup>48</sup> KRS § 403.190(2) (Cum. Supp. 1982). Although the degree may be acquired during the marriage, much of the value it represents will not be so acquired.

<sup>49</sup> *See* *Robinson v. Robinson*, 569 S.W.2d 178, 181 (Ky. Ct. App. 1978).

the extent of the equity owned by the spouse claiming a non-marital interest at the time of the marriage.<sup>50</sup> Like equity in a home, earning capacity is not acquired at one point in time.<sup>51</sup> In fact the earning capacity of a degree holder will be augmented after the marriage ceases, raising problems of dividing an asset not acquired during the marriage. Second, valuing spousal contribution to educational advancement according to future earning capacity is objectionable because it binds the degree holding spouse to his or her occupation and imposes upon him or her requirements of success that may be unrealistic.<sup>52</sup> In addition, valuation by future earning capacity could emphasize the status aspect of the marriage too much. While spouses of medical students may feel that the circumstances of their marriage entitle them to maintain a lifestyle commensurate with what they would have enjoyed had the marriage continued, the marital property statute does not permit status considerations in determining whether an asset is divisible marital property.<sup>53</sup> Under Kentucky's current statute, status considerations such as the duration of the marriage<sup>54</sup> and the lifestyle it would have afforded the parties<sup>55</sup> are relevant in determining the amount of divisible property to be awarded or the amount of maintenance but they should not be used to determine initial divisibility.<sup>56</sup>

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<sup>50</sup> See *Newman v. Newman*, 597 S.W.2d 137, 138 (Ky. 1980); *Brandenburg v. Brandenburg*, 617 S.W.2d 871, 872 (Ky. Ct. App. 1981); *Woosnam v. Woosnam*, 587 S.W.2d 262, 264 (Ky. Ct. App. 1979).

<sup>51</sup> Of course, future earning capacity in divorce cases can be *valued* at a particular point in time much as it is in wrongful death cases. See *Levy v. Levy*, 397 A.2d at 374. Speculation about future earning capacity is necessary when the earner is dead in order to provide any recovery. Further, such speculation can hardly tie the dead earner to an occupation. Thus, the concerns present in divorce are absent in wrongful death situations.

<sup>52</sup> *Moss v. Moss*, 659 S.W.2d at 374.

<sup>53</sup> The considerations under the marital property statute are the time of acquisition and the manner of acquisition. KRS § 403.190(2)(a)-(e) (Cum. Supp. 1982).

<sup>54</sup> KRS § 403.190(1)(c) (Cum. Supp. 1982).

<sup>55</sup> KRS § 403.200(2)(c), (d) (Cum. Supp. 1982).

<sup>56</sup> The problem of divisibility of degrees and licenses illustrates the practical difficulty with certain aspects of the Uniform Marriage and Divorce Act. In theory, the Act recognizes each spouse as a contributor to the marital partnership. See KRS § 403.190(1)(a) (Cum. Supp. 1982) (recognizing the contribution of a homemaker spouse).

One problematic aspect of the *Moss* decision is the court's lengthy discussion of the "practice" of pharmacy. If the court's meaning is that no valuation of the future earnings of a practice is permissible, the discussion of the practice simply reinforces its refusal to adopt future earning capacity as a method of valuation. If, on the other hand, the court's discussion is interpreted to mean that a spouse with a practice has no divisible assets, the result will be unfortunate. Businesses begun during marriage are commonly valued as marital property and are at least theoretically subject to division.<sup>57</sup> A blanket distinction between a commercial enterprise such as a hardware store and a professional practice raises numerous problems. Both types of enterprise may have assets such as accounts receivable or goodwill regarded as too speculative for division.<sup>58</sup> Nevertheless each has some assets subject to current valuation without regard to the overly speculative assets and excluding the future earning capacity of the busi-

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When a divorce occurs, the marital assets should be divided and maintenance awarded only if a spouse cannot meet his or her needs through divided property or appropriate employment. KRS § 403.200(1) (Cum. Supp. 1982). Where one spouse puts another through advanced education and divorce occurs soon thereafter, however, there often are few assets to divide. *Inman v. Inman*, 578 S.W.2d at 266; *In re Marriage of Lundberg*, 318 N.W.2d at 918. Additionally, one spouse in such a case may seek compensation from the other based upon an unfulfilled agreement for reciprocal advancement. *See Roberto v. Brown*, 318 N.W.2d 358 (Wis. 1982).

<sup>57</sup> *See, e.g.*, *Culver v. Culver*, 572 S.W.2d 617 (Ky. Ct. App. 1978) (corporation's value included as marital property); *Browning v. Browning*, 551 S.W.2d 823 (Ky. Ct. App. 1977) (corporate shares are marital property). *See also In re Marriage of Smith*, 427 N.E.2d 1239 (Ill. 1981) (office and rental property are marital); *In re Marriage of White*, 424 N.E.2d 421 (Ill. Ct. App. 1981) (trial court must make valuation of dental corporation for purposes of distributing marital property). A decision that a business is marital property need not result in division of the business. It merely recognizes that the business is part of the marital estate and requires an offsetting award to the other spouse. *Clark v. Clark*, 487 S.W.2d 272 (Ky. 1972).

<sup>58</sup> *See Johnson v. Johnson*, 254 N.W.2d 198 (Wis. 1977) (accounts receivable too speculative to divide). *But see In re Marriage of Lukens*, 558 P.2d 279 (Wash. Ct. App. 1976) (business goodwill is a divisible asset); *In re Marriage of Fortier*, 109 Cal. Rptr. 915 (Cal. Ct. App. 1973) (good will is a divisible asset). *See also In re Marriage of Johnson*, 576 P.2d 188 (Colo. Ct. App. 1977) (unpaid commissions are divisible property).

ness.<sup>59</sup> To suggest that nothing related to the practice should be considered divisible marital property would produce an untenable distinction between professional practices and other kinds of commercial enterprises.<sup>60</sup>

A second problem raised by *Moss* is the court's award to a spouse who also was awarded maintenance. Although the maintenance award to Mrs. Moss was a limited one, the presence of any maintenance award distinguishes the case from *Inman I*. The court in *Inman I* was careful to point out that unless it allowed Sue Inman to recover, she would be "barred from any return on . . . her investment."<sup>61</sup> Such language suggests that the court's award was grounded in its broad equity powers rather than upon any strict reading of the marital property statute. If *Inman* awards are to be extended to instances in which a spouse is also entitled to maintenance, the theoretical basis of such awards will need reexamination.<sup>62</sup>

## II. MAINTENANCE AND CHILD SUPPORT

### A. Child Support Jurisdictional Requirements

In *McCormick v. McCormick*<sup>63</sup> the Kentucky Supreme Court ruled that the guidelines for determining whether Kentucky courts should exercise jurisdiction in child support actions are the same as those that prevail in custody modifications.<sup>64</sup> The

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<sup>59</sup> Attorneys and physicians commonly own real estate, libraries or other physical assets of their profession. These assets may have significant value and may have been acquired during the marriage.

<sup>60</sup> But see *Litman v. Litman*, 8 FAM. L. REP. (BNA) 2691 (1982) (ethical considerations preventing sale by an attorney of his or her practice dictate that law practice is not a divisible asset).

<sup>61</sup> 578 S.W.2d at 268.

<sup>62</sup> Cf. *In re Marriage of Lundberg*, 318 N.W.2d at 918. The Wisconsin court was able to award maintenance in *Lundberg* because the maintenance statute was not limited to cases of need and made specific reference to reimbursement for contribution to educational advances.

<sup>63</sup> 623 S.W.2d 909 (Ky. 1981).

<sup>64</sup> *Id.* at 910. KRS § 403.420 (Cum. Supp. 1980) establishes the basis for jurisdiction in child custody disputes. The statute provides for jurisdiction if: 1) Kentucky is the home

McCormicks had obtained a Kentucky divorce in 1968. Both parties then moved out of state. At the time of the current action McCormick was a Georgia resident; his former wife was a Louisiana resident. The Court first noted that three prior, voluntary submissions to the jurisdiction of Kentucky courts did not estop McCormick from claiming that Kentucky was no longer a proper forum.<sup>65</sup> The Court ruled that although Kentucky could provide a forum for child support modification when there was a "fair justification or legitimate reason" to do so, the state could refuse to provide a forum when the contacts between the parties and the state had become "so attenuated" that Kentucky was no longer "even arguably" a convenient forum.<sup>66</sup>

*McCormick* is an appropriate case for the use of *forum non conveniens*. Mrs. McCormick had an alternative forum in her own home state through the use of the Uniform Reciprocal Enforcement of Support Act.<sup>67</sup> Further, under that Act Kentucky's law would not have applied because the forum is required to apply the law of the state in which the obligor is located.<sup>68</sup> Thus, any interest the petitioner in *McCormick* had in selecting Kentucky as a jurisdiction in which to litigate was outweighed by a number of other factors.

The Court's use of the *forum non conveniens* doctrine avoided the due process issue.<sup>69</sup> The facts of the case indicate that

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state of the child and a parent of the child; or 2) if it is in the best interest of the child for Kentucky to assume jurisdiction because the parties have a significant connection with the state, and substantial evidence concerning the child's welfare is available there; or 3) the child is abandoned, mistreated, abused, or neglected in Kentucky; or 4) no other state would have jurisdiction under the prerequisites of 1), 2) or 3) above, or another state has otherwise declined jurisdiction for a more appropriate forum. Kentucky courts have always required maximum contacts in order to support child custody jurisdiction. *Turley v. Griffin*, 508 S.W.2d 765, 766 (Ky. 1974). In contrast, minimum contacts satisfy jurisdiction for the award of child support. *See, e.g., Hall v. Hall*, 585 S.W.2d 384 (Ky. 1979); *Ullman v. Ullman*, 302 S.W.2d 849 (Ky. 1957); *Benson v. Benson*, 291 S.W.2d 27 (Ky. 1956); *Beutel v. Beutel*, 205 S.W.2d 489 (Ky. 1947).

<sup>65</sup> 623 S.W.2d at 10.

<sup>66</sup> *Id.*

<sup>67</sup> *See* LA. REV. STAT. ANN. §§ 13.1641-.1698 (West Supp. 1980).

<sup>68</sup> *See* KRS §§ 407.010-.480 (Cum. Supp. 1980).

<sup>69</sup> 623 S.W.2d at 910 n.3.

Kentucky's continued assertion of jurisdiction would have been constitutionally prohibited. The United States Supreme Court has been unwilling to interpret a parent's action in allowing a child to travel to a state as consent to the jurisdiction of that state for matters of child support modification.<sup>70</sup> Such action, according to the Supreme Court, cannot be interpreted as a "purposeful availing" of the forum state.<sup>71</sup> Although Mr. McCormick had consented to the Kentucky court's jurisdiction rather than simply permitting his children to travel to Kentucky, the distinction is a difficult one to make if it can be made at all. As long as the focus of in personam jurisdiction is on the *defendant's* actions with regard to the forum, cases like *McCormick* represent the outer limits to which due process might be stretched.<sup>72</sup>

### B. Trial Court Retention of Jurisdiction over Maintenance

Under the Kentucky divorce statute, either spouse may seek maintenance but neither is automatically entitled to such an award.<sup>73</sup> Instead, a spouse seeking maintenance must establish both a lack of sufficient property to provide for his or her reasonable needs<sup>74</sup> and either an inability to support himself or herself

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<sup>70</sup> *Kulko v. Superior Court*, 436 U.S. 84 (1978).

<sup>71</sup> *Id.* at 94.

<sup>72</sup> Justice Stephens, in a vigorous dissent, argued that questions pertaining to child support jurisdictional issues are not analogous to those involving child custody. Since the purpose of the Uniform Child Custody Jurisdiction Act is to serve as an anti-kidnapping measure, the Act requires courts to decline jurisdiction in order to prevent parents from surreptitiously removing their children to another state. *McCormick v. McCormick*, 623 S.W.2d at 911 (Stephens, J., dissenting). The best interest of the child, therefore, is served by declining jurisdiction. In child support cases, however, the state has an interest in ensuring adequate child support. *Id.* Providing a forum readily accessible to the custodial parent seeking support was, therefore, in the best interest of the child. *Id.*

While Justice Stephens is correct that the jurisdictional requirements in child custody cases are intended to prevent child snatching, his argument for a state interest in providing support holds true only if Kentucky has some connection to the child. The McCormick children were no longer Kentucky residents and had not been for more than ten years. Under those circumstances, it seems inappropriate for Kentucky to claim a continuing interest in the children.

Justice Stephens further stated that McCormick's prior voluntary appearances in Kentucky courts in connection with the divorce were sufficient to satisfy due process. *Id.* at 912.

<sup>73</sup> KRS § 403.200 (Cum. Supp. 1982).

<sup>74</sup> *Newman v. Newman*, 597 S.W.2d at 137, 140.



through appropriate employment<sup>75</sup> or a custodial status that makes employment outside the home inappropriate.<sup>76</sup> Commentators discussing the Uniform Marriage and Divorce Act, from which Kentucky's statute is derived, have noted that while the result of the statute is the greater availability of property distribution between the spouses, the statute also drastically reduces the availability of maintenance.<sup>77</sup> Indeed, maintenance under divorce statutes similar to the Kentucky statute is often called rehabilitative maintenance.<sup>78</sup> In some situations this works a relative unfairness upon wives who entered into lengthy marriages at a time when both societal norms and divorce laws encouraged their expectation of lifelong dependency.<sup>79</sup> Kentucky courts have been careful to recognize the problems inherent in the maintenance statute and have applied it realistically. In those instances in which economic independence is not practically possible, both trial and appellate courts have generally refused to award only limited maintenance.<sup>80</sup>

Recently, the court of appeals has again shown caution in assessing the realistic possibility of economic independence for a former spouse. In *James v. James*<sup>81</sup> the court upheld the trial court's right to reserve the issue of maintenance for a spouse not currently entitled to support but who had a history of cancer. The *James* court carefully limited its holding to an instance of a projected permanent incapacity for self-support due to an exist-

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<sup>75</sup> *Casper v. Casper*, 510 S.W.2d 253, 254 (Ky. 1974).

<sup>76</sup> *Richie v. Richie*, 596 S.W.2d 32, 34 (Ky. Ct. App. 1980); *Chapman v. Chapman*, 498 S.W.2d at 134, 135.

<sup>77</sup> See generally Comment, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F.L. REV. 493 (1978).

<sup>78</sup> Rehabilitative maintenance permits an award of maintenance to aid divorced persons in entering or reentering the work force. See *Mertz v. Mertz*, 287 So. 2d 691, 692 (Fla. Dist. Ct. App. 1973). For that reason, it contemplates payments necessary for training or education to permit an individual to become self supporting. *Robinson v. Robinson*, 366 So. 2d 1210, 1211 (Fla. Dist. Ct. App. 1979).

<sup>79</sup> See *Lindsay v. Lindsay*, 565 P.2d 199 (Ariz. Ct. App. 1977); *In re Marriage of Pieper*, 398 N.E.2d 868 (Ill. App. Ct. 1979); *Brueggemann v. Brueggemann*, 551 S.W.2d 853 (Mo. Ct. App. 1977); *In re Marriage of Madson*, 590 P.2d 110 (Mont. 1978).

<sup>80</sup> *Combs v. Combs*, 622 S.W.2d 679 (Ky. Ct. App. 1981), *discretionary rev. denied*, (Ky. Nov. 17, 1981); *Frost v. Frost*, 581 S.W.2d 582, 584 (Ky. Ct. App. 1979).

<sup>81</sup> 618 S.W.2d 187 (Ky. Ct. App. 1981).

ing injury.<sup>82</sup> Although the age and other circumstances of the parties, including a lengthy marriage, indicate the court's unwillingness to interpret the maintenance statute to disadvantage such parties,<sup>83</sup> a note of caution should be sounded. If the former wife in *James* is forced to seek maintenance because of a recurrence of her illness, she will be able to do so only because her counsel was careful enough to request that the trial court reserve the issue and did not accept a lump sum maintenance award. Recent rulings of the Kentucky Supreme Court render the latter awards final and non-modifiable.<sup>84</sup> For that reason, attorneys whose clients do have serious, existing injuries must take into account the possibility of further incapacitation and request that the trial court draft the award so that it falls outside the rule of finality.

### C. *Child Support*

Several technical questions concerning child support also faced Kentucky appellate courts in the past year. Under Kentucky law, either parent may be required to pay support to a minor child of the marriage.<sup>85</sup> In most cases the age of majority at the time of the divorce decree will determine when the supporting parent may discontinue such payments.<sup>86</sup> In *Weilage v. Weil-*

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<sup>82</sup> *Id.* at 188. See also *Newman v. Newman*, 355 N.E.2d 867, 869 (Ind. Ct. App. 1976). Some courts do not require the presence of an existing illness or injury, retaining jurisdiction if there is any possibility of health problems. *Evans v. Evans*, 337 So. 2d 998, 1000 (Fla. Dist. Ct. App. 1976). The requirement of an existing illness is preferable because cases in which general health concerns are paramount could be handled under more general exceptions to rehabilitative maintenance. See generally *Combs v. Combs*, 622 S.W.2d at 680.

<sup>83</sup> *James* and the Kentucky cases refusing to award only rehabilitative maintenance to spouses not capable of economic independence share a common thread. See notes 78-80 *supra* for a list of the cases.

<sup>84</sup> *E.g.*, *Dame v. Dame*, 628 S.W.2d 625 (Ky. 1981). See text accompanying notes 129-36 *infra* for a discussion of this point.

<sup>85</sup> KRS § 403.210 (Cum. Supp. 1982).

<sup>86</sup> The problem arises because the 1965 legislature lowered the age of majority from 21 to 18. KRS § 2.015 (1980). Kentucky appellate courts have required obligors under pre-

age,<sup>87</sup> however, the court of appeals held that an order subsequent to the original divorce decree that not only modified child support but also transferred the custody of the children in question was based upon a new contract that rescinded the earlier parental agreement incorporated into the divorce decree. The support parent in *Weilage* could not be required to pay support to a child over eighteen but under twenty-one years of age because the age of majority at the time of the subsequent agreement, eighteen, controlled.<sup>88</sup>

Child support awards in divorce are usually based upon the needs of the parties' minor children and technically are not an award to the custodial parent. But the Kentucky Court of Appeals in *Harvey v. McGuire*<sup>89</sup> held that in an action to collect child support arrearages after children have reached the age of majority, the custodial parent is the real party in interest and may prosecute the action in his or her own name.<sup>90</sup> The court based its decision upon the fact that the custodial parent had been required to pay the support owed by the non-custodial parent and should be able to recover that amount.<sup>91</sup>

Finally, in *Stewart v. Raikes*,<sup>92</sup> the Kentucky Supreme Court

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1965 decrees which state that payments would continue until majority to continue payment until minor children reach 21. *Worrell v. Worrell*, 489 S.W.2d 817 (Ky. 1973); *Kirchner v. Kirchner*, 465 S.W.2d 299 (Ky. 1971); *Collins v. Collins*, 418 S.W.2d 739 (Ky. 1967); *Wilcox v. Wilcox*, 406 S.W.2d 152 (Ky. 1966). When decrees were silent as to the duration of payments, however, the obligation terminated at 18. *Young v. Young*, 413 S.W.2d 887 (Ky. 1967). Modification of the amount of support after the 1965 amendment did not alter the requirement that the obligor continue to pay until the minor child reached 21. *Showalter v. Showalter*, 497 S.W.2d 420 (Ky. 1973).

<sup>87</sup> 637 S.W.2d 660 (Ky. Ct. App. 1982).

<sup>88</sup> *Id.* at 611. The court's decision rests upon its conclusion that the second agreement between the parties was a new contract rather than modification of part of an existing contract. If the court was correct in its application of contract principles, its decision was consistent with its earlier rulings that parents would be held to intend payment until the age of majority in force at the time of the contract's making.

<sup>89</sup> 635 S.W.2d 8 (Ky. Ct. App. 1982).

<sup>90</sup> *Id.* at 9. The court applied the 15-year statute of limitations on judgments. *Id.*

<sup>91</sup> *Id.* The court's conclusion that the non-obligor parent's right was based upon her assumption of the obligor's duty avoids the interpretation that child support is owed to the custodial parent rather than to the child.

<sup>92</sup> 627 S.W.2d 586, 589 (Ky. 1982).

held that a mother's failure to reduce child support arrearages to a lump sum judgment did not prevent her from collecting the unpaid arrearages from the deceased father's estate. The decision reflects the flexibility given to trial courts upon the death of the obligor where child support has been awarded.<sup>93</sup>

### III. PROBLEMS WITH ENFORCEMENT OF JUDGMENTS

A number of domestic relations cases before the appellate courts last term may profitably be classified as involving the enforceability of judgments. These disputes concerned recognition of foreign equity decrees, collection of marital property division, the finality of maintenance orders and the enforcement of sister state custody modifications.

#### A. *Recognition of Foreign Equity Decrees*

As every student of conflicts knows, the rule of *Fall v. Eastin* prohibits the courts of one state from affecting title to land in another state.<sup>94</sup> In *Arthur v. Arthur*,<sup>95</sup> the Kentucky Court of Appeals avoided *Fall's* traditional prohibition by enforcing the "equities" arising from an Indiana divorce decree.

Lois and Maynard Arthur were divorced in 1975 by an Indiana court.<sup>96</sup> The Indiana court determined that Maynard's half interest in a eleven-acre tract in Laurel County, Kentucky, was \$3,000. It ordered Maynard to pay fifty dollars per week for

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<sup>93</sup> See KRS § 403.250(3) (Cum. Supp. 1982).

<sup>94</sup> 215 U.S. 1 (1909). In *Fall* the parties were divorced in Washington. The Washington divorce court awarded Mrs. Fall an interest in real property located in Nebraska and ordered her husband to convey that interest to her. When he failed to do so, the land was conveyed to her by a commissioner's deed. Mr. Fall then conveyed the land to third parties. When Mrs. Fall brought suit to quiet title to the land in a Nebraska court, the court refused to give effect to the Washington commissioner's deed. The Supreme Court of the United States upheld that refusal on the ground that the Washington commissioner's deed was ineffective to convey title to land situated in another state.

<sup>95</sup> 625 S.W.2d 592 (Ky. Ct. App. 1982).

<sup>96</sup> The divorce occurred in Indiana because Maynard was serving a life sentence in an Indiana prison. *Id.* Although traditional rules would indicate that Maynard could not have acquired an Indiana domicile, RESTATEMENT (SECOND) CONFLICT OF LAWS § 17 (1971) (domicile cannot be acquired by party present under compulsion), Indiana courts apparently believed him to be a rather permanent resident. Certainly, it is unlikely that Maynard was forum shopping.

child support and placed a lien upon the Laurel County land to secure the payment of the child support and required Maynard to quit-claim the land to Lois when child support arrearages reached the value of the half interest. In 1976 an Indiana commissioner's deed carried out the provisions of the court order and was recorded in Laurel County. Earlier in 1975, however, Maynard conveyed the property to his brother, Lonnie.<sup>97</sup>

The Laurel Circuit Court found Maynard's conveyance to Lonnie to be fraudulent and ruled Lois to be entitled to the land by virtue of the Indiana commissioner's deed. The Kentucky Court of Appeals concluded that, although the conveyance between the brothers was fraudulent, *Fall* barred the Indiana court from affecting title to land in Kentucky.<sup>98</sup> It then remanded the case to the trial court to permit a determination whether the equities warranted conveyance of the property to Lois.

*Arthur* places Kentucky in that majority group of states that enforce foreign equity decrees.<sup>99</sup> A rule providing for the enforcement of such decrees means that, although Kentucky courts would not give effect to a sister state's commissioner's deed, they would permit enforcement of an order from the sister state's courts requiring a party to give the deed.<sup>100</sup> The appellee's wife in *Arthur* argued that an earlier decision of the court in *Becker v. Becker*<sup>101</sup> required the court to accept the Indiana commissioner's deed. The court of appeals correctly distinguished *Becker* because in that decision the Kentucky court had ordered the conveyance of land outside of Kentucky by a party subject to per-

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<sup>97</sup> 625 S.W.2d at 594.

<sup>98</sup> *Id.* at 594-95. Although the United States Supreme Court did not state that the *Fall* purchasers were not bona fide claimants, they were *Fall*'s siblings and were likely to have had notice of the former spouse's claim.

<sup>99</sup> The United States Supreme Court has never ruled on whether foreign equity decrees are entitled to enforcement in sister states. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 comment c (1971). Such decrees might be enforceable under the implementing statute to the full faith and credit clause, 28 U.S.C. § 1738 (1976), which requires full faith and credit be given to the judicial proceedings of sister states. *Id.*

<sup>100</sup> Kentucky would have jurisdiction to require enforcement by virtue of the land's presence in this state. Because *Shaffer v. Heitner*, 433 U.S. 186 (1977), does not apply to post-judgment remedies, Kentucky courts need not reassess the defendant's contacts with the state.

<sup>101</sup> 576 S.W.2d 255 (Ky. Ct. App. 1979).

sonal jurisdiction within the state.<sup>102</sup>

Taken together, *Arthur* and *Becker* place Kentucky courts in the position of protecting any valid Kentucky interest in land within the state while attempting to fully and fairly settle disputes litigated in its court system. In a bilateral divorce such as *Becker*, there is no reason for a trial court to refuse to divide the property owned by the parties even though it is located outside of Kentucky. A bilateral divorce cannot occur in Kentucky unless one party has satisfied the jurisdictional requirements.<sup>103</sup>

It is fair to assume that consent to jurisdiction indicates that the consenting party agreed to permit Kentucky rules to resolve the dispute.<sup>104</sup> In the face of that assumption it would be unreasonable for a Kentucky court to refuse to deal with property located outside of the state.<sup>105</sup> Conversely, when both litigants have appeared in a sister state's court and that court has ordered the conveyance of a deed, it makes little sense for Kentucky to refuse to enforce such an order to convey. Had the party conveyed the deed, the conveyance would have been valid.<sup>106</sup> Since the deed conveyed by the party would be valid and enforceable, no important Kentucky interest would be upset by enforcement of the equity decree.

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<sup>102</sup> *Id.* *Becker* did not and could not predict how the Kentucky litigant's refusal to convey the land would be treated in the state where the land was located.

<sup>103</sup> The petitioner must have been a Kentucky resident for 180 days preceding the commencement of the action. KRS § 403.140(1)(a) (Cum. Supp. 1982).

<sup>104</sup> It should not matter whether the residency agreement is satisfied by petitioner or respondent. Where the petitioner is a Kentucky resident and the other spouse enters the state for the purpose of litigation, he or she consents to the application of Kentucky rules. Cf. *Hughes v. Fetter*, 341 U.S. 609 (1951). Where the respondent is a Kentucky resident, he or she has sufficient connection with the state to permit application of Kentucky rules to marriage dissolution. *But see* notes 107-28 *infra* and accompanying text with regard to military pensions.

<sup>105</sup> This result should be true even if the land were located in another state whose rules for dividing marital property were significantly different from Kentucky rules. *See, e.g.,* CAL. CIV. CODE § 4800 (West 1970) (requiring equal division). Although the state in which the land is located may have significant interests in the stability of land title within the state, it does not necessarily have any significant interest in the distribution of assets on marriage dissolution. Further, although the situs state would not have to enforce the foreign conveyance, it could not relitigate property distribution arising in a bilateral divorce. *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

<sup>106</sup> *See generally* Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 15-17 (1963).

## B. *Collection of Property Settlement Where One Party is in the Military*

Divisibility of pension benefits in general and of federal retirement benefits in particular has occupied court attention at both the state and federal level. Under the United States Supreme court ruling in *McCarty v. McCarty*,<sup>107</sup> military retirement pay remained the individual property of the military retiree and was not subject to division upon divorce under state law. Although military retirement pay had to be assigned as separate property to the military spouse, a state trial court was not prevented from awarding maintenance to the non-military spouse. A former spouse with a maintenance claim might enforce that claim by garnishment of the military retiree's pay, with payment made directly to the ex-spouse.<sup>108</sup> A spouse with a property claim, however, could not have the claim paid directly to him or her through use of the garnishment statute since he or she had no cause of action under the garnishment statute.<sup>109</sup> In most states *McCarty* was given only prospective effect.<sup>110</sup>

Congress has now altered the result of *McCarty* by amending Title X of the United States Code.<sup>111</sup> The new legislation expands the rights of former spouses because it permits division of military retirement pay, entitles some former spouses to collect directly from the government and permits enforcement of property division claims in military divorces.<sup>112</sup> Jurisdictional require-

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<sup>107</sup> 453 U.S. 210 (1981). The Kentucky Court of Appeals anticipated *McCarty*'s holding in *Russell v. Russell*, 605 S.W.2d 33 (Ky. Ct. App. 1980).

<sup>108</sup> 42 U.S.C. § 659 (Supp. 1982). The garnishment statute applies only to money held by the United States that represents an entitlement based upon remuneration. Thus, the statute does not apply to proceeds of an insurance policy. Cf. *Ridgway v. Ridgway*, 454 U.S. 46 (1981).

<sup>109</sup> A definitional section applying to the garnishment statute defined alimony to include support claims, but not those based upon property distribution. 42 U.S.C. § 662(c) (Supp. 1982).

<sup>110</sup> See *Ersan v. Badgett*, 659 F.2d 26 (5th Cir. 1981); *Fellers v. Fellers*, 178 Cal. Rptr. 35 (Cal. Ct. App. 1981); *In re Marriage of Mahone*, 176 Cal. Rptr. 274 (Cal. Ct. App. 1981); *Braden v. Reno*, 8 Fam. L. Rptr (BNA) 2041 (Idaho 1981).

<sup>111</sup> In conjunction with the 1983 Department of Defense Authorization Act, Pub. L. No. 97-252, 96 Stat. 719 (1982), Congress amended Title X of the United States Code by adding to Chapter 71 a new act, the Uniform Services Former Spouses' Protection Act, Pub. L. No. 97-252, §§ 1001-06, 96 Stat. 730-38 (Sept. 8, 1982) (codified at 10 U.S.C.S. § 1408) (Law. Co-op. 1982) (reprinted in 51 U.S.L.W. 131-33 (Dec. 21, 1982)).

<sup>112</sup> 10 U.S.C.S. § 1408 (Law. Co-op. 1982).

ments in the legislation, however, will restrict the number of courts able to make such an enforceable division.<sup>113</sup>

The legislation permits, but does not mandate, that retirement pay be divided. The impact of this legislation in Kentucky is uncertain because Kentucky courts have refused to divide non-vested retirement benefits.<sup>114</sup> Because military benefits do not vest for twenty years, many spouses will continue to be barred from a property award by the state rule.<sup>115</sup> Further, even in those instances in which benefits are vested, the federal amendments permit division of the benefits by courts of this state only if Kentucky is the domicile or legal residence of the military member for reasons other than military orders or in those cases in which the military member consents.<sup>116</sup> When pay is divisible, a former spouse may collect directly from the government if he or she has been married to the military member for at least ten years and during the marriage the member has performed ten years of creditable service.<sup>117</sup> Finally, the congressional legislation directs that *McCarty* not be given retroactive effect.<sup>118</sup>

The legislation's jurisdictional requirements are likely to cause interpretation problems for Kentucky trial courts. The state divorce statute requires only that the petitioner establish that he or she has been a Kentucky resident for 180 days preceding the commencement of the action.<sup>119</sup> The federal legislation requires domicile or legal residence.<sup>120</sup> Although the federal and state requirements are not the same,<sup>121</sup> a trial court's ability to dissolve marriages should not be impeded. The traditional basis for divorce jurisdiction is that the forum state be the domicile of the plaintiff spouse.<sup>122</sup> Kentucky's statutory requirement de-

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<sup>113</sup> 10 U.S.C.S. § 1408(c)(4) (Law. Co-op. 1982).

<sup>114</sup> *Light v. Light*, 599 S.W.2d 476 (Ky. Ct. App. 1980); *Ratcliff v. Ratcliff*, 586 S.W.2d 292 (Ky. Ct. App. 1979).

<sup>115</sup> 599 S.W.2d at 476.

<sup>116</sup> 10 U.S.C.S. § 1408(c)(4) (Law. Co-op. 1982).

<sup>117</sup> 10 U.S.C.S. § 1408(d)(2) (Law. Co-op. 1982).

<sup>118</sup> 128 CONG. REC. H5957, 5999 (1982).

<sup>119</sup> KRS § 403.110 (Cum. Supp. 1982).

<sup>120</sup> 128 CONG. REC. H5957, 5999 (1982).

<sup>121</sup> Under Kentucky's 180-day residency requirement, some litigants must establish more than domicile. Since domicile requires both physical presence and an intention to remain for an indefinite period of time, domicile might be established after a considerably shorter period. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971).

<sup>122</sup> *Williams v. North Carolina*, 317 U.S. 287 (1942).



mands no less. Indeed, it may require more.<sup>123</sup> Kentucky should be able to continue to dissolve marriages under its statutory rule even when the respondent is not a Kentucky domiciliary and is absent from the state.<sup>124</sup> Federal limitations apply only to property division and not to marriage dissolutions.

Some examples will illustrate the mechanics of the federal statute. First, assume that a spouse brings suit against a military member who has no connection with Kentucky. If the spouse satisfies the 180-day requirement, he or she should be able to procure a divorce in Kentucky. However, property could not be divided nor could maintenance be awarded against the absent spouse.<sup>125</sup> If, however, the military spouse, although absent from the state by virtue of military duty, were a Kentucky domiciliary, the Kentucky court could (under federal legislation) divide the retirement benefits and (under usual theories of personal jurisdiction) it might award maintenance or child support against such a spouse.<sup>126</sup> The most difficult problem arises when the respondent in a divorce is a non-domiciliary military member present in Kentucky because of military service. Under these circumstances, military personnel who enter an appearance at the divorce in order to contest maintenance and child support might also be deemed to consent to the court's division of military retirement benefits.<sup>127</sup> If presence sufficient for contesting maintenance or child support awards requires military personnel to subject retirement benefits to division, the fear that states with no significant connection to the military member other than mil-

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<sup>123</sup> See note 121 *supra* in which these added requirements are discussed.

<sup>124</sup> *Williams v. North Carolina*, 317 U.S. at 287.

<sup>125</sup> *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1948).

<sup>126</sup> Courts of a party's domicile possess personal jurisdiction over the party. *Milliken v. Meyer*, 311 U.S. 457 (1940). The military member would, however, be entitled to the protection of the Soldier and Sailor's Civil Relief Act of 1940, 50 U.S.C.S. §§ 501-91 (1976). For a case in which it is not clear that that act was invoked to protect a woman service member, see *Davis v. Davis*, 619 S.W.2d 727 (Ky. Ct. App. 1981).

<sup>127</sup> Military presence alone would not give Kentucky jurisdiction to divide benefits. 10 U.S.C.S. § 1408(c)(4) (Law. Co-op. 1982). Appearing in the action might, however, be interpreted as consent. *Id.*

itary presence could divide military benefits may be realized.<sup>128</sup>

### C. *Finality of Maintenance Order*

As most divorce practitioners are aware, maintenance awards can present significant problems of enforceability.<sup>129</sup> Many of those problems have arisen in the context of interstate enforcement.<sup>130</sup> This term, however, the Kentucky Supreme Court has settled an enforceability question related not to interstate support but to modifiability of a lump sum maintenance award. In *Dame v. Dame*<sup>131</sup> the Court held that lump sum awards were not subject to modification under the Kentucky divorce statute. Relying on precedent from other Uniform Marriage and Divorce Act jurisdictions, the Supreme Court found Kentucky's adoption of that statute did not change prior Kentucky cases holding that lump sum awards, even if paid out in installments, were not subject to modification.<sup>132</sup>

Although the state divorce statute arguably favors property division over maintenance awards,<sup>133</sup> Kentucky courts have been careful to avoid the use of the statute to disadvantage spouses in marriages of significant length who foreseeably are unable to become economically independent.<sup>134</sup> The non-modification rule of *Dame* may inevitably lead trial courts to be even more cautious in awarding lump sum maintenance. While caution is dictated in

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<sup>128</sup> See *McCarty v. McCarty*, 453 U.S. at 234-35. Hopefully, state courts will treat military presence in a jurisdiction as sufficient to establish personal jurisdiction for maintenance or child support awards. If not, the non-military spouse could seek an award by bringing an action under the Uniform Reciprocal Enforcement of Support Act against the military member in his or her domicile. That action would almost certainly be resisted by the military member under the Soldier and Sailor's Civil Relief Act, 50 U.S.C.S. §§ 501-91 (1976). Further, evidence relevant to both maintenance and child support is not likely to be found at a domicile where the obligor does not reside.

<sup>129</sup> Maintenance awards may be modified on a showing of a change in circumstances so substantial and continuing as to render the original award unconscionable. KRS § 403.250(1) (Cum. Supp. 1982).

<sup>130</sup> Maintenance awards do not demand full faith and credit in sister states if they are modifiable in the state of rendition. *Sistare v. Sistare*, 218 U.S. 1 (1910).

<sup>131</sup> 628 S.W.2d 625 (Ky. 1981).

<sup>132</sup> *Id.*

<sup>133</sup> See text accompanying notes 73-78 *supra* for a discussion of the limited nature of maintenance awards.

<sup>134</sup> See text accompanying notes 78-84 *supra* for a discussion of this point.

some instances,<sup>135</sup> the *Dame* rule should not discourage all lump sum awards. Where there is no foreseeable reason why a spouse cannot become self-supporting and absent other circumstances rendering the award unfair,<sup>136</sup> such awards serve a beneficial function of severing economic as well as marital ties. Lower courts should not adopt the *Dame* rule as a buttress for indiscriminate open-ended maintenance awards.

#### D. *Enforceability of a Sister State Custody Decree*

Most problems with the enforcement of sister state custody decrees have been ameliorated by the widespread adoption of the Uniform Child Custody Jurisdiction Act (UCCJA). Nonetheless, custody decrees from Texas, a holdout state not adopting that Act, continue to pose difficult enforcement problems for courts.<sup>137</sup> This term, in *Perry v. Perry*<sup>138</sup> the Kentucky Supreme Court, whose opinions have been a model of restraint on the issue of jurisdiction to litigate child custody, ruled that a custody decree from a state that had not adopted the uniform act was not entitled to full faith and credit in Kentucky courts. While it is clear that the Texas court rendering the modification decree would not have had jurisdiction under the uniform act, the Kentucky decision is an unfortunate one prompted by a difficult set of circumstances. The decision is unfortunate because it is incorrect. The mother, who lost custody under the Texas modification, had an opportunity to contest jurisdiction in Texas. Her failure to do so should have made that forum's decree enforceable in this state.

The original custody decree in *Perry* was rendered in 1977, when a Texas divorce court awarded custody of the child to his mother.<sup>139</sup> Some two years later, after both the mother and the child had moved from Texas to Kentucky, the father brought modification proceedings in the original divorce forum. The

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<sup>135</sup> See *James v. James*, 618 S.W.2d at 187.

<sup>136</sup> See text accompanying notes 79-84 *supra* for a discussion of circumstances when a maintenance award should be subject to modification.

<sup>137</sup> Texas is the only state not adopting the Act. See Freed & Foster, *Family Law in the Fifty States: An Overview As of September, 1982*, 8 FAM. L. RPTR. (BNA) 4065 (Sept. 28, 1982).

<sup>138</sup> 639 S.W.2d 780 (Ky. 1982).

<sup>139</sup> *Id.* at 781.

Texas court found that the mother and child were subject to the court's personal jurisdiction.<sup>140</sup> After the mother's Texas attorney failed to appear at a hearing on the merits, the Texas court ruled that she had defaulted and entered an order changing custody to the child's father pursuant to his allegations in the hearing. The child's mother did not appeal the Texas court decision.<sup>141</sup> A short time later the father moved a Kentucky court to enforce the Texas court's modification of its earlier custody award. Before the circuit court could hold a hearing on the enforcement of the Texas award, the father sought a writ of mandamus from the Kentucky Court of Appeals to compel the trial court to give full faith and credit to the Texas custody order.<sup>142</sup> The trial court denied enforcement of the Texas order after hearing testimony on the merits of the parties' claims.<sup>143</sup> The court of appeals reversed the trial court's order,<sup>144</sup> and an appeal was taken to the Kentucky Supreme Court.

The Supreme Court held that the sole issue before it was whether the Texas decree was entitled to full faith and credit. It ruled, however, that the full faith and credit issue was controlled by *May v. Anderson*<sup>145</sup> and that the Texas court, which lacked personal jurisdiction over the mother, could not cut off her right to custody. The Court dismissed other cases relied upon by the court of appeals as inapposite,<sup>146</sup> either on the ground that they involved different types of appearances by defendants or on the ground that the cited cases were not true full faith and credit cases.<sup>147</sup>

Conceding the Court's point that the mother's appearance in the Texas court was a special appearance designed under Texas Rules of Civil Procedure to permit a contest of that state's jurisdiction, the mother should nevertheless have been bound by the

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<sup>140</sup> *Id.* Texas courts continue to apply a theory of continuing jurisdiction in child custody cases.

<sup>141</sup> *Id.* While the remedy may be of little satisfaction to a parent deprived of custody, some action could be taken against the Texas attorney who failed to enter an appearance and who did not preserve the jurisdictional question.

<sup>142</sup> 639 S.W.2d at 781.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> 345 U.S. 528 (1953).

<sup>146</sup> 639 S.W.2d at 782.

<sup>147</sup> *Id.*

Texas litigation because her attorney failed to contest that state's jurisdiction and allowed that issue to be decided against her.<sup>148</sup> A forum court faced with an argument that the rendering court lacked jurisdiction must determine the jurisdictional issue by reference to the local law of the rendering state.<sup>149</sup> If, under Texas rules, a party who enters a special appearance but fails to defend that appearance can be held to be before the court for all purposes, then Texas did have jurisdiction over the mother. Further, an incorrect assertion of jurisdiction by a Texas court could only be challenged by an appeal through the Texas court system and not by a collateral attack when the decree was sought to be enforced.<sup>150</sup> The Court's analogy to *May* is improper because that case involved a party who entered *no* appearance in the courts of Wisconsin. In contrast, the mother put herself before Texas courts under the Texas special appearance rule and then failed to contest the jurisdictional issue.

*Perry* is a clear example of the old saw that hard cases make bad law. Neither the mother nor the child had resided in Texas for more than two years. If Texas adopted the Act, its courts would have been required to dismiss the case.<sup>151</sup> The Kentucky Court unfortunately chose to afford relief to the mother in plain disregard for established rules of collateral attack.

#### IV. MARRIAGE

##### A. *Loss of Consortium*

At common law, only the husband<sup>152</sup> had the right to recover for loss of consortium.<sup>153</sup> Today, a majority of states, whether by statute or case law, have extended the common law remedy to

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<sup>148</sup> See *Baldwin v. Iowa Traveling Men's Ass'n*, 283 U.S. 522 (1931).

<sup>149</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 105, comment b (1971).

<sup>150</sup> See 283 U.S. at 522.

<sup>151</sup> UNIF. CHILD CUSTODY JURISDICTIONAL ACT § 1, 9 U.L.A. 116 (1968).

<sup>152</sup> "[T]he inferior hath no kind of property in the company, care, or assistance of the superior and therefore can suffer no loss or injury." 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 143 (11th ed. 1791).

<sup>153</sup> Loss of consortium means the loss of a couple's mutual rights to each other's society, affection and companionship, including the loss or impairment of sexual relations. *Deems v. Western Md. Ry.*, 231 A.2d 514, 517 (Md. 1967).

wives, so they also may recover for consortium loss.<sup>154</sup> However, the courts have consistently refused to extend this cause of action to unmarried cohabitants.<sup>155</sup> The Kentucky Court of Appeals confronted the issue of whether the cause of the loss must occur during marriage in *Angelet v. Shivar*.<sup>156</sup>

The appellant, Robert Angelet, demanded judgment for loss of his wife's services: "Her care, consideration, companionship and society."<sup>157</sup> The damages, however, were alleged to have resulted from injuries intentionally inflicted by the wife's father when she was a minor under his care, custody and control.<sup>158</sup> Angelet argued that, although his wife's injuries occurred prior to their marriage, his damages occurred during the marriage and therefore an action for loss of consortium was proper.<sup>159</sup> The *Angelet* court reaffirmed, however, that "a claim for loss of con-

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<sup>154</sup> See *Duffy v. Lipsman-Fulkerson & Co.*, 200 F. Supp. 71 (D. Mont. 1961); *Cooney v. Moomaw*, 109 F. Supp. 448 (D. Neb. 1953); *Swartz v. United States Steel Corp.*, 304 So. 2d 881 (Ala. 1974); *Schreiner v. Fruit*, 519 P.2d 462 (Alaska 1974); *City of Glendale v. Bradshaw*, 503 P.2d 803 (Ariz. 1972); *Missouri Pac. Transp. Co. v. Miller*, 299 S.W.2d 41 (Ark. 1957); *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669 (Cal. 1974); *Hopson v. St. Mary's Hosp.*, 408 A.2d 260 (Conn. 1979); *Gates v. Foley*, 247 So. 2d 40 (Fla. 1971); *Brown v. Georgia-Tennessee Coaches*, 77 S.E.2d (Ga. Ct. App. 1953); *Nishi v. Hartwell*, 473 P.2d 116 (Hawaii 1970); *Nichols v. Sonneman*, 418 P.2d 562 (Idaho 1966); *Dim v. Naiditch*, 170 N.E.2d 881 (Ill. 1960); *Troue v. Marker*, 252 N.E.2d 800 (Ind. 1969); *Acuff v. Schmit*, 78 N.W.2d 480 (Iowa 1956); *Kotsiris v. Ling*, 451 S.W.2d 411 (Ky. 1970); *Deems v. Western Md. Ry.*, 231 A.2d at 514; *Diaz v. Eli Lilly & Co.*, 302 N.E.2d 555 (Mass. 1973); *Montgomery v. Stephan*, 101 N.W.2d 229 (Mich. 1960); *Thill v. Modern Erecting Co.*, 170 N.W.2d 865 (Minn. 1969); *Novak v. Kansas City Transit, Inc.*, 365 S.W.2d 539 (Mo. 1963); *General Elec. Co. v. Bush*, 498 P.2d 366 (Nev. 1972); *Ekalo v. Constructive Serv. Corp.*, 216 A.2d 1 (N.J. 1965); *Millington v. Southeastern Elevator Co.*, 239 N.E.2d 897 (N.Y. 1968); *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 258 N.E.2d 230 (Ohio 1970); *Hopkins v. Blanco*, 302 A.2d 855 (Pa. Super. Ct. 1973); *Mariani v. Nanni*, 185 A.2d 119 (R.I. 1962); *Hoekstra v. Helgeland*, 98 N.W.2d 669 (S.D. 1959); *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978); *Moran v. Quality Alum. Casting Co.*, 150 N.W.2d 137 (Wis. 1967); COLO. REV. STAT. § 14-2-209 (1974); ME. REV. STAT. ANN. tit. 19, § 167-A (1964); MISS. CODE ANN. § 93-3-1 (1972); N.H. REV. STAT. ANN. § 507:8-a (1968); OKLA. STAT. ANN. tit. 32, § 15 (West 1976); OR. REV. STAT. § 108.010 (1979); TENN. CODE ANN. § 25-1-106 (1980); VT. STAT. ANN. tit. 12, § 5431 (Cum. Supp. 1982); W. VA. CODE § 48-3-19a (1980).

<sup>155</sup> For a critical analysis of the recent decisions prohibiting unmarried couples from presenting a cause of action for loss of consortium, see Case Comment, *Family Law*, 69 ILL. B.J. 49 (1980). See also Comment, *Loss of Consortium and Unmarried Cohabitants: An Examination of Tong v. Jolson*, 14 U.S.F.L. REV. 133 (1979).

<sup>156</sup> 602 S.W.2d 185 (Ky. Ct. App. 1980).

<sup>157</sup> *Id.* at 185.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

sortium is directly dependent upon the marital relationship for its existence."<sup>160</sup>

## B. *Bigamy*

Under traditional rules, some marriages are voidable and others void, depending upon the strength of the societal prohibi-

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<sup>160</sup> *Id.* at 186. The rationale for delineating the scope of the right on the basis of marital status varies from jurisdiction to jurisdiction. *See, e.g.,* *Wagner v. International Harvester Co.*, 455 F. Supp. 168 (D. Minn. 1978); *Tong v. Jocsen*, 142 Cal. Rptr. 726 (Ct. App. 1977); *Rademacher v. Torbensen*, 13 N.Y.S.2d 124 (App. Div. 1939). *Accord* *Domany v. Otis Elevator Co.*, 369 F.2d 604 (6th Cir. 1966), *cert. denied*, 387 U.S. 942 (1967); *Booth v. Baltimore & O.R. Co.*, 87 S.E. 84 (W. Va. 1915).

In *Wagner*, the couple did not even know each other at the time of the accident. The court held that a person " 'should not be entitled to marry a cause of action.' " 455 F. Supp. at 169 (quoting *Sartori v. Gradison Auto Bus Co., Inc.*, 42 Pa.D. & C.2d 781 (1967)). In *Jocson*, at the time of the car accident, the plaintiff had been living with his fiancée for several months. Subsequent to the accident, the couple married and the husband filed suit for loss of consortium arising from his wife's injuries. 142 Cal. Rptr. at 727. The court denied recovery asserting that liability for loss of consortium cannot extend to all foreseeable relationships, stating that " 'legal causation must terminate somewhere.' " *Id.* (quoting *Suter v. Leonard*, 120 Cal. Rptr. 110, 111 (Ct. App. 1975)). In *Rademacher*, the court held that a husband who married a woman disabled as a result of a previous injury assumed the cost of her medical care after the marriage. 13 N.Y.S.2d at 124.

In all of the aforementioned cases, the loss of consortium claim was based on acts of negligence, whereas in *Angelet* the injury resulted from intentional misconduct. However, the *Angelet* court rejected this distinguishing factor. 602 S.W.2d at 186.

The author has found only one case where a spouse was allowed to maintain a cause of action for loss of consortium although the injury occurred prior to the marital relationship. *See* *Sutherland v. Auch Inter-Borough Transit Co.*, 366 F. Supp. 127 (E.D. Pa. 1973). In *Sutherland*, at the time of the car accident the parties were engaged to be married in less than a month. The damage award was therefore calculated from the date of the marriage. *Id.* at 134.

The decision in *Angelet v. Shivar* may be inconsistent with other recent decisions removing marital status as a consideration in determining the scope of legal rights and remedies. *See, e.g.,* *Trimble v. Gordon*, 430 U.S. 762 (1977) (rights incident to parent-child relationship not limited to marital relationship); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion right extends to unmarried individuals); *Eisenstadt v. Bard*, 405 U.S. 438 (1972) (right of privacy of unmarried individual to use contraceptives); *Stanley v. Illinois*, 405 U.S. 645 (1972) (cannot deny custody to father because unwed). However, consortium loss between unmarried individuals may well be different from the situation where the parent-child relationship is the focus.

tion against marriage.<sup>161</sup> For example, incestuous marriages,<sup>162</sup> bigamous marriages<sup>163</sup> and marriages to an insane person<sup>164</sup> were generally regarded in Kentucky as void. Underage marriages were regarded as voidable.<sup>165</sup>

In *Ferguson v. Ferguson*,<sup>166</sup> the Kentucky Court of Appeals ruled that a 1972 legislative change overturned all distinctions between void and voidable marriages.<sup>167</sup> The *Ferguson* court rejected the challenge by the decedent's only child, William, to the appointment of the decedent's bigamous wife as the personal representative of the estate,<sup>168</sup> ruling that Williams could not collat-

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<sup>161</sup> A void marriage has no legal or binding force and is incapable of ratification; third parties may collaterally attack the marriage even after the death of one of the parties. A voidable marriage is one that is valid unless dissolved by the action of one of the parties in a judicial proceeding. Although imperfect, it is not open to collateral attack. See R. PETRILLI, *supra* note 16, at § 1.4. This distinction often works to deprive an innocent "spouse" of social security benefits, workers' compensation or the financial benefit of a share in a deceased spouse's estate.

<sup>162</sup> *Baker v. Thomas*, 114 S.W.2d 1113 (Ky. 1938).

<sup>163</sup> *Rose v. Rose*, 118 S.W.2d 529 (Ky. 1938).

<sup>164</sup> *Beddow v. Beddow*, 257 S.W.2d 45 (Ky. 1952).

<sup>165</sup> *Mangrum v. Mangrum*, 220 S.W.2d 406 (Ky. 1949).

<sup>166</sup> 610 S.W.2d 925 (Ky. Ct. App. 1980). In 1972, the Kentucky legislature enacted KRS § 403.120 (Cum. Supp. 1982), delineating those circumstances under which a marriage may be declared void by the court. The statute provides in part:

(1) The circuit court shall enter its decree declaring the invalidity of a marriage entered into under the following circumstances:

(c) *The marriage is prohibited.*

(2) A declaration of invalidity under paragraph (a), (b) or (c) of subsection (1) may be sought by any of the following persons and must be commenced within the times specified, but only for the causes set out in paragraph (a) may a declaration of invalidity be sought after the death of either party to the marriage:

(b) *For the reason set forth in paragraph (c) of subsection (1), by either party, no later than one year after the petitioner obtained knowledge of the described condition.*

*Id.* (emphasis added).

<sup>167</sup> 610 S.W.2d at 927.

<sup>168</sup> Kentucky has adopted a statutory preference for appointing surviving spouses as personal representatives. KRS § 395.020(1) (Cum. Supp. 1980).



erally attack the marriage.<sup>169</sup> Prohibited marriages<sup>170</sup> may now be attacked only within the statutory boundaries. Collateral attack by third parties upon prohibited marriages is not permitted and a party may attack such a marriage only within strict time limits.<sup>171</sup>

## V. PATERNITY

In *Mills v. Habluetzel*,<sup>172</sup> the United States Supreme Court struck down Texas' one year statute of limitations for paternity actions. Although the majority opinion spoke only to the Texas statute, Justice O'Connor filed a concurring opinion noting that other statutes longer than one year might be subject to claims of unconstitutionality.<sup>173</sup> Courts in states with statutory periods significantly longer than Kentucky's three-year periods have held those statutes unconstitutional.<sup>174</sup> At the court of appeals level, the Kentucky statute survived a pre-*Mills* state court challenge to its constitutionality in *Commonwealth ex rel. Sledge v. Marshall*;<sup>175</sup> however, the Kentucky Supreme Court has granted discretionary review of the case.

It is unlikely that *Mills* will force a finding of unconstitutionality of Kentucky's three-year statute. The Court in *Mills* showed deference to state interests in the problems of proof of paternity.<sup>176</sup> The court of appeals in *Marshall* focused upon both proof problems and deference owed to the three year legislatively-created period.<sup>177</sup> Taken together, the *Mills* and *Marshall* opinions indicate that the United States Supreme Court will respect

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<sup>169</sup> 610 S.W.2d at 926. *But cf.* Boone v. Gonzalez, 550 S.W.2d 571 (Ky. Ct. App. 1977) (permitting attack by spouse more than one year after marriage on grounds of fraud).

<sup>170</sup> Kentucky prohibits incestuous marriages, bigamous marriages, marriages to persons adjudicated incompetent, under-age marriages and marriages not properly solemnized. KRS §§ 402.010-.020 (Cum. Supp. 1980).

<sup>171</sup> See note 166 *supra* for the text of KRS § 403.120 (Cum. Supp. 1982), relating to the time limits and restriction on collateral attack.

<sup>172</sup> 456 U.S. 91 (1982).

<sup>173</sup> *Id.* at 102 (O'Connor, J., concurring).

<sup>174</sup> Oregon v. Bradley, 8 FAM. L. REP. (BNA) 2696 (1982).

<sup>175</sup> No. 81-CA-974-DB, 29 KLS 3, at 2 (Ky. Ct. App. Feb. 26, 1982), *discretionary review granted*, No. 82-SC-254-DG (Ky. Aug. 24, 1982).

<sup>176</sup> 102 S. Ct. at 1554-55.

<sup>177</sup> 29 KLS 3, at 3.

Kentucky's assertion of a viable state interest in a relatively short statute of limitations. Any broadening of the rights of illegitimate children, therefore, will have to come from improved paternity testing or legislative redrafting.

